Teh Poh Wah v Seremban Securities Sdn Bhd

COURT OF APPEAL (MALAYSIA) — CIVIL APPEAL NO N–02–143–95
GOPAL SRI RAM, SITI NORMA YAAKOB JJCA AND MOKHTAR SIDIN J
20 NOVEMBER

***Contract** — Estoppel — Estoppel by conduct — Mareva order imposed on defendant's husband — Defendant assisted husband to evade effects of order — Defendant gave cheques which were signed in blank to husband — Husband entered written contract with plaintiff stockbroker to buy and sell shares using defendant's name — Whether defendant's conduct would have led a reasonable man to believe that she had given her husband complete freedom to act on her behalf — Whether plaintiff was influenced by the defendant's conduct to entertain such belief — Whether defendant was estopped from asserting facts that would contradict her earlier conduct — Whether defendant could assert that there was no contractual relationship between her and the plaintiff*

***Contract** — Illegality — Defence of — Husband entered written contract with stockbroker to buy and sell shares using wife's name — Husband had a Mareva order imposed on him — Stockbroker not aware — Whether contract tainted with illegality*

The appellant's husband had a Mareva order imposed on him. In order to help her husband to trade in shares despite the Mareva order, the appellant signed all the cheques in her cheque book in blank, and handed them to her husband. The appellant's husband then entered into a written contract with Seremban Securities Sdn Bhd ('the respondents') to buy and sell shares through them. As the agreement was entered in the appellant's name, all transactions were done in that name. There was no suggestion that the respondents knew what the appellant's husband was up to. When the account with the respondents went bad, they brought an action against the appellant to recover the money owed to them. The appellant delivered a defence and counterclaim, arguing that: (i) there was no contractual relationship between the appellant and the respondents, as she had never signed the agreement and that the share account was never operated by her; (ii) the contract was tainted with illegality ab initio. The respondents' application to strike out the appellant's pleading was granted by the trial judge. The appellant appealed to the Court of Appeal. The appellant's counsel submitted that this case was unsuitable for resolution under the court's summary jurisdiction, as there were serious issues of fact and law which were plainly arguable. The appellant's counsel further complained that despite the fact that the appellant had raised triable issues, the trial judge had decided in the respondents' favour based on just one point, ie that two payments had been made to the respondents by way of cheques drawn on the appellant's account.

Held, dismissing the appeal:

(1) There was nothing illegal about the contract relied upon by the respondents. There was no suggestion that the respondents entered into the agreement with the object of breaching the terms of the Mareva injunction (see p 705G).

(2) This appeal could be resolved by reference to the doctrine of estoppel. The appellant, by her actings, would have led a reasonable man to believe that she had given her husband *carte blanche* to act on her behalf. It could further be inferred from the undisputed facts that the respondents were influenced by the conduct of the appellant to entertain such a belief. Pursuant to the doctrine, the appellant could not now assert facts that would contradict her earlier conduct as that would be inequitable and unjust. She must face the consequences of the series of events which she set in motion by acceding to the husband's plan (see p 706A–D); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed.

(3) The trial judge was entitled to rely on the conduct of the appellant when testing the triability of the issues she had raised in her defence. This was a plain and obvious case in which the judge was well entitled to exercise the summary power to strike out a pleading (see p 708C).

Per curiam:

The doctrine of estoppel is a flexible doctrine by which courts seek to do essential justice between litigating parties. The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract. Both plaintiffs and defendants may have recourse to the estoppel, and the doctrine is not confined to cases where a representation of fact has been made, or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact (see pp 706C–I and 707A–D).

[Bahasa Malaysia summary

Suami perayu telah dikenakan dengan suatu perintah Mareva. Untuk membantu suaminya untuk menjual beli syer sungguhpun perintah Mareva tersebut wujud, perayu telah menandatangani kesemua cek dalam buku ceknya secara kosong, dan memberikan cek tersebut kepada suaminya. Suami perayu kemudiannya mengikat kontrak secara bertulis dengan Seremban Securities Sdn Bhd ('penentang') untuk membeli dan menjual syer melalui mereka. Oleh kerana perjanjian tersebut telah diikat dengan menggunakan nama perayu, kesemua urusniaga telah dijalankan dalam nama itu. Tidak terdapat cadangan bahawa penentang mengetahui apa yang dibuat oleh suami perayu. Apabila akaun dengan penentang menjadi buruk, mereka memulakan suatu tindakan terhadap perayu untuk mendapatkan wang yang terhutang kepada mereka kembali. Perayu menyampaikan

A suatu pembelaan dan tuntutan balas, dan menghujah bahawa: (i) tidak terdapat perhubungan kontraktual antara perayu dengan penentang, kerana dia tidak pernah menandatangani perjanjian tersebut dan bahawa akaun syer tidak pernah dikendalikan olehnya; dan (ii) kontrak tersebut adalah tercemar oleh kepenyalahan undang-undang ab initio. Permohonan penentang untuk membatalkan pliding perayu telah dibenarkan oleh hakim perbicaraan. Perayu merayu kepada Mahkamah Rayuan. Peguam perayu menyatakan bahawa kes ini adalah tidak sesuai untuk diselesaikan di bawah bidang kuasa terus mahkamah, kerana terdapat isu fakta dan undang-undang serius yang jelas boleh dibicarakan. Peguam perayu juga mengadu bahawa sungguhpun pada hakikatnya perayu telah membangkitkan isu yang boleh dibicarakan, hakim perbicaraan telah membuat keputusan yang memihak kepada penentang berdasarkan satu perkara sahaja, iaitu dua pembayaran telah pun diberikan kepada penentang secara cek atas akaun perayu.

Diputuskan, menolak rayuan:

(1) Tidak terdapat apa-apa yang menyalahi undang-undang tentang kontrak yang penentang mendasarkan kesnya. Tidak terdapat cadangan bahawa penentang telah mengikat perjanjian dengan tujuan untuk memungkiri terma injunksi Mareva (lihat ms 705G).

(2) Rayuan ini boleh diselesaikan dengan merujuk kepada doktrin estopel. Perayu, dengan tindakannya, boleh menyebabkan seorang yang munasabah mempercayai bahawa dia telah memberikan suaminya *carte blanche* untuk bertindak atas pihaknya. Juga, boleh diinfer daripada fakta yang tidak boleh dipertikaikan bahawa penentang telah dipengaruhi oleh kelakuan perayu untuk melayani kepercayaan. Mengikut doktrin tersebut, perayu kini tidak boleh menyatakan fakta yang bertentangan dengan kelakuannya yang terdahulu kerana itu adalah tidak saksama dan tidak adil. Dia harus menghadapi akibat siri peristiwa yang dia mulakan kerana bersetuju dengan cadangan suaminya (lihat ms 706A–D); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut.

(3) Hakim perbicaraan berhak untuk bergantung kepada kelakuan perayu apabila beliau memeriksa sama ada isu yang dia telah bangkitkan dalam pembelaannya boleh dibicarakan atau tidak. Ini merupakan suatu kes yang jelas dan nyata yang hakim adalah sesungguhnya berhak untuk melaksanakan kuasa terus beliau untuk membatalkan suatu pliding (lihat ms 708C).

Per curiam:

Doktrin estopel merupakan suatu doktrin yang fleksibel yang melaluinya, mahkamah mencapai keadilan asas antara pihak-pihak dalam pembicaraan. Doktrin tersebut boleh digunakan untuk menambahkan atau mengurangkan hak atau kewajipan suatu pihak

di bawah suatu kontrak. Kedua-dua plaintif dan defendan boleh menggunakan estopel, dan doktrin tersebut adalah tidak terhad kepada kes di mana representasi fakta telah dibuat, atau di mana sesuatu pihak telah digalakkan oleh seorang yang lain untuk mempercayai kewujudan atau ketidakwujudan sesuatu fakta (lihat ms 706C–I dan 707A–D).

Notes

For cases on estoppel, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1542–1548.

For cases on illegality, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1733–1810.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202

Amalgamated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd [1982] 1 QB 84

American Surety Co of New York v Calgary Milling Co Ltd (1919) 48 DLR 295

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor [1970] 1 MLJ 222

Dawsons Bank v Nippon Menkwa Kabushiki Kaisha LR 62 IA 100

De Tchihatchef v Salerni Coupling Ltd [1932] 1 Ch 330

Sarat Chunder Dey v Gopal Chunder Laha LR 19 IA 203

Spiro v Lintern [1973] 3 All ER 319

Taylor Fashions Ltd v Liverpool Victoria Friendly Society [1981] 1 All ER 897

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

Legislation referred to

Limitation Act 1952

Appeal from: Civil Suit No 22–149–92 (High Court, Seremban)

Tay Hong Huat (Robert CC Low with him*) (Cheang & Ariff)* for the appellant.

D Krishna (Pretam Singh with him*) (Stanley Ponniah Ng & Soo)* for the respondents.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): The appellant is a married woman. Her husband had had a Mareva injunction imposed upon him. He obviously wanted to evade the effects of that order. He used his wife to achieve this. She too willingly lent him a hand.

She opened a bank account with Public Bank and was given a cheque book. She says that she signed all the cheques in blank and handed the

A whole book to the husband. He then entered into a contract with the respondents, who are, as their name suggests, stock brokers. There was a written agreement; but the appellant claims that she never signed it. She says that she was in Singapore on the date appearing on that document. The address appearing on the agreement is not hers.

B The husband then bought and sold shares through the respondents. Because the appellant's name was on the agreement, all transactions were done in that name. She says that she knew nothing about all this. There is no suggestion that the respondents knew what the husband was up to. When the account with them went bad, they brought an action against the appellant to recover the monies owed to them. It comes to a little more C than RM275,000.

The appellant delivered a defence and counterclaim. She raised several issues in it. The respondents then applied to the judge to have the appellant's pleading struck out. He acceded to that application. The appellant appealed to us. Her counsel argued her case with skill and care. But we were not convinced D that the judge was wrong. That is why we dismissed the appeal without calling upon counsel for the respondents to address us.

At the forefront of counsel's submissions was the argument that there were in this case serious issues of fact and law that were plainly unsuitable for resolution under the court's summary jurisdiction. Counsel however E concentrated his attention upon two issues which he said were plainly arguable. They are as follows:

(1) There was no contractual relationship between the appellant and the respondents. The share account was never operated by the appellant. This is conceded by the respondents. The only evidence against her F were two payments made by way of cheques drawn on her account. But in this respect, counsel relied upon those facts to which we have already made reference, namely, the circumstances surrounding the opening of the bank account and the handing over of the pre-signed cheques to the husband, as negating liability on the appellant's part.

G (2) The contract was tainted with illegality ab initio. Apart from mentioning this point, counsel made no serious attempt to develop it during argument. We may therefore quite easily dispose of this point by observing that there was nothing illegal about the contract relied upon by the respondents. If counsel meant that the illegality arose from the husband's plan to evade the Mareva injunction and to then H thumb his nose at the court, we must point out once again, that there is no suggestion that the respondent entered into the agreement with the object of breaching the terms of the Mareva injunction.

We now turn to consider the remaining argument. Counsel pointed out that the learned judge in the court below did in fact appreciate that the I factual issues raised by the appellant were triable. However, the judge decided in the respondents' favour basing himself only upon the two payments of which we have already made mention. This, it was submitted, was a wrong approach to the case. With respect, we are of the view that the judge was right and that counsel is wrong in his argument.

This is a case where the wife, by her actings, would have led a reasonable man to believe that she had given her husband a *carte blanche* to act on her behalf. The undisputed facts reasonably support an inference that the respondent was influenced by the conduct of the appellant to entertain such a belief. She cannot therefore now assert facts that would contradict her earlier conduct. That would be inequitable and therefore unjust. She must face the consequences of the series of events which she set in motion by acceding to the husband's plan. If it were otherwise, it would amount to our letting her off the hook for assisting in the intentional breach of an order of court. That would, in our judgment, amount to condoning an attempt to subvert the machinery of justice. We will not tolerate such a result.

In our judgment, this appeal may quite satisfactorily be resolved by reference to the doctrine of estoppel. It is a flexible doctrine by which courts seek to do essential justice between litigating parties.

In this context we find it sufficient to quote the following passage in the judgment of the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344 upon the wide scope of the doctrine:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to

believe as the true legal effect or meaning: *American Surety Co of New York v Calgary Milling Co Ltd* (1919) 48 DLR 295; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions.*

We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine *in this context* is that stated by Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey* and the *Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.

In *Spiro v Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002, a husband, wishing to sell his house, left it to his wife to make the arrangements to engage estate agents to find a purchaser. But he gave her no authority to sell. The wife, however, went ahead and entered into an agreement to sell the house. The husband did nothing to disclaim the sale. In an action for specific performance, the trial judge found for the plaintiff, holding that the husband was estopped from proving that the contract had been entered into without his authority.

The husband appealed. The English Court of Appeal dismissed the appeal. Russell LJ (as he then was), delivering the judgment of the court said (at p 1011 of the report):

> Mr Albery has submitted that this is not so because a representation for the purposes of the doctrine of estoppel must be precise and unambiguous: *Low* v *Bouverie* [1891] 3 Ch 82 and *Woodhouse AC Israel Cocoa Ltd SA* v *Nigerian Produce Marketing Co Ltd* [1972] AC 741 Mr Albery says that Mr Lintern's conduct might equally well have led Mr Spiro to suppose that Mr Lintern believed himself to have ratified his wife's action or that Mr Lintern was merely concerned to protect his wife from a claim by Mr Spiro for damages for breach of contract. We feel unable to accept these arguments. As we have already mentioned, Mr Lintern could not ratify his wife's action in the circumstances of this case because of the rule recognised in *Keighley, Maxsted & Co* v *Durant* [1901] AC 240. It does not lie in Mr Lintern's mouth to say that the representation implicit in his conduct was equivocal because Mr Spiro might have thought that Mr Lintern had done something which in law he could not do. Mr Lintern could only protect his wife from liability in breach of contract by himself accepting liability on the contract, and this in the circumstances of the present case would involve his representing that the contract had been entered into with his authority.

We are mindful that it would be quite inappropriate to attempt a comparison between the facts of two cases; for one set of facts are no authority for another, no matter how close their resemblance. However, we cannot help but notice that the appellant in the present case is in a position, far worse, or at the very least, analogous to the husband in *Spiro v Lintern*. If it was no answer for the husband in that case to say that he had not actually authorized his wife to enter into a contract in his name, we see less reason for holding the contrary in the present case.

Counsel for the appellant complained that the judge was wrong to have allowed the case to have turned upon just the one point relating to the payments made. For our part, we are unable to discern any error on the part of the learned judge for taking the course that he did. He merely relied on the conduct of the appellant when testing the triability of the issues she had raised in her defence. We are satisfied that, on the authorities as they now stand, he was entitled to do that.

It is settled law that the summary power to strike out a pleading ought not to be invoked save in plain and obvious cases. There are many cases which recite this proposition and we do not intend to repeat them here. Suffice to say that this is a plain and obvious case in which the judge was well entitled to exercise the summary power.

For the reasons given, we formed the view that the appeal was without merit and accordingly dismissed it with costs. The orders of the judge were affirmed and the deposit paid into court was ordered to be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

Reported by Isabel Liong